

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 16**

**INTERNATIONAL LONGSHOREMEN'S  
ASSOCIATION LOCAL 28  
(CERES GULF, INC.)**

**and**

**Cases 16-CB-181716  
and 16-CB-194603**

**DONNA MARIE MATA, an individual**

**INTERNATIONAL LONGSHOREMEN'S ASSOCIATION LOCAL 28'S  
POST-HEARING BRIEF**

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## **Abbreviation Key**

The April 3-4, 2017 Hearing Transcript is referred to as TR p.#, l.#.

The General Counsel's Exhibits are referred to as GC Ex. #.

International Longshoremen's Association Local 28's (Respondent) Exhibits are referred to as RESP Ex. #.

When specific page or paragraph numbers within exhibits are referred to they are designated p. # or ¶ # respectively.

**TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:**

In introducing Donna Mata's ("Mata") charges, the General Counsel promised a record of "discriminatory, invidious, arbitrary, and unconscionable" conduct by International Longshoremen's Association Local 28 ("Local 28").<sup>1</sup> The record was to show that Local 28's "agent, Tim Harris, engaged in prolonged gender discrimination regarding access to training certifications, ... as well as sexual assault of Ms. Mata."<sup>2</sup> The General Counsel promised to show that Local 28, through Tim Harris ("Harris"), engaged in discrimination "based on [his] overt discriminatory beliefs that women are not capable of completing the same jobs as men, that they're unfit for them as men are, that women are less competent than men in completing certain jobs."<sup>3</sup> The evidence was to show that "Mr. Harris' pattern of demeaning women and intent to discriminate against them was evident in both his withholding of training and job opportunities as well as his physical assault of Ms. Mata."<sup>4</sup> The General Counsel did not simply fall short, it wholly failed to evidence the overt, invidious, arbitrary, and discriminatory environment Mata claims exists within Local 28.

In determining to prosecute this matter, the General Counsel was, unfortunately, forced to rely on the facts as Mata portrayed them. When reviewing the facts in whole however, it is apparent that Mata's portrayal has no basis. There is no competent evidence before this tribunal on which a finding that Local 28 discriminated generally against women or specifically against Mata can be based. Equally true is the absence of competent evidence on which to base a finding that Local 28 attempted to coerce Mata into withdrawing her charge against Local 28.

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<sup>1</sup> TR p. 8, l. 16-17.

<sup>2</sup> TR p. 7, l. 13-16.

<sup>3</sup> TR p. 7, l. 17-21.

<sup>4</sup> TR p. 7, l. 22-25.

## I.

### **Summary of the Argument**

Local 28 facilitates the attendance of individuals seeking employment through its hiring hall in training classes conducted by the West Gulf Maritime Association (“WGMA”). It does this by announcing the availability of classes when the WGMA schedule is finalized. Individuals then convey their interest in a class to Local 28 which, in turn, provides that information to the WGMA. The WGMA then ensures the individuals are qualified to take the class and, if space permits, lists them as attendees. The individual then attends the class. Mata claims Local 28 discriminatorily refused to provide for her inclusion in the WGMA training classes.

It is unclear precisely how Mata contends this discrimination was effected. Women are included in the lists provided by Local 28 and Mata herself received training through this process. Mata routinely sought inclusion belatedly, requiring her to attend by stand-by. While Mata asserts she was sexually assaulted and denied training by Harris, other than her own allegations, no evidence supports the assertion. Mata brought the allegation to Local 28’s attention over a year after she alleges the last assault occurred. At that time, Local 28 immediately addressed the allegation and ensured that the training Mata claimed she was being denied was made available to her. No evidence of disparate treatment is evidenced. In fact, it is evidenced that a male worker and Mata received almost identical placement in a Yard Tractor training class on their arrival at Local 28. The evidence in this matter does not even make out a *prima facie* case.

Equally unavailing is the claim that Local 28 sought to coerce Mata into withdrawing her initial unfair labor practices charge against it. Mata and Jessie San Miguel, Jr. (“San Miguel, Jr.”), the individual it is claimed made the attempt, are family

members. Mata brought San Miguel, Jr. into this matter by telling him of her accusations concerning Harris' conduct in June 2016. Mata and San Miguel, Jr. spoke of the matter through the next several months as San Miguel, Jr. attempted to assist Mata. Mata expressed to San Miguel, Jr. her interest in withdrawing the charge. There is no evidence that Local 28 directed or requested San Miguel, Jr. convince Mata to withdraw her charge.

The only result in this matter supported by the evidence is the dismissal in its entirety of the charges against Local 28.

## **II.**

### **The Claims**

It is alleged that:

From about March 1, 2016 to about August 1, 2016, [Local 28] prohibited [Mata] from being added to certification training lists; and

From about March 1, 2016 to about August 1, 2016, [Local 28] prohibited [Mata] from receiving certification training.<sup>5</sup>

It is alleged that Local 28 was motivated to engage in this conduct due to Mata's gender.<sup>6</sup>

It is also alleged that:

Since about December 1, 2016, [Local 28], by J.P. San Miguel, Jr., solicited [Mata] to withdraw her unfair labor practice charge in Case 16-CB-181716.<sup>7</sup>

Based on these allegations, it is alleged that Local 28 failed to properly represent Mata and that Local 28 violated the rights assured under Sections 7 and 8(b)(1)(A) of the National Labor Relations Act.<sup>8</sup>

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<sup>5</sup> GC Ex. 1(h) ¶¶ 9-10; TR. p. 170, l 14-p. 172, l. 3.

<sup>6</sup> GC Ex. 1(h) ¶ 12.

<sup>7</sup> GC Ex. 1(h) ¶ 11.

<sup>8</sup> GC Ex. 1(h) ¶¶ 13-14.



### III.

#### **The Applicable Legal Standard**

The General Counsel acknowledges that “the bar to finding a union has breached its duty of fair representation is admittedly high.”<sup>9</sup> The General Counsel must establish its claims by a preponderance of the credible evidence.<sup>10</sup>

To determine whether a union’s conduct can be classified as arbitrary, discriminatory, or in bad faith, so as to establish the breach of the duty of fair representation, the *Wright Line* analysis is utilized.<sup>11</sup> The framework is particularly appropriate when two different reasons, one permissible and the other impermissible, could have caused the outcome.<sup>12</sup>

First, the General Counsel must make a *prima facie* showing sufficient to support the inference that gender was a “motivating factor” in the union’s alleged adverse action.<sup>13</sup> If the General Counsel meets this burden, the burden shifts to the union to show, by a preponderance of the evidence, that the same outcome would have occurred regardless.<sup>14</sup> The *Wright Line* framework applies to claims under Sections 7 and 8(b)(1)(A) of the National Labor Relations Act.<sup>15</sup>

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<sup>9</sup> TR p. 8, l. 9-10.

<sup>10</sup> 22 C.F.R. § 1423.18; *Aerospace Industrial Dist. Lodge 751*, 270 N.L.R.B. 1059 (1984).

<sup>11</sup> *NLRB v. Teamsters Gen. Local Union No. 200*, 723 F.3d 778, 786 (7th Cir. 2013) (citing *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083, 1087 (1980)).

<sup>12</sup> *NLRB*, 723 F.3d at 786.

<sup>13</sup> *NLRB*, 723 F.3d at 787 (applying framework to alleged discrimination because of union member’s political activity); *Aerospace Industrial Dist.*, 270 NLRB 1059, 1066 (1984) (applying framework to alleged refusal to file a grievance because of non-union status).

<sup>14</sup> See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 400 (1983), *abrogated in part on other grounds by Dir., Office of Workers’ Comp. Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *NLRB*, 723 F.3d at 788.

<sup>15</sup> *Aerospace Indus. Dist.*, 270 NLRB at 1066; Section 8(b)(1)(A) is codified at 29 U.S.C. § 158(b)(1)(A); *Plasters Local 21*, 264 N.L.R.B. 192 (1982) and *Teamsters “General” Local Union No. 200*, 357 N.R.L.B. 192 (2011). Section 7 is codified at 29 U.S.C. § 157.

#### IV.

##### **The Issues**

There are but two issues in this matter.

First, did Local 28 violate 29 U.S.C. § 158(b)(1)(A) by denying Mata training and certification due to her gender.

Second, did Local 28 violate 29 U.S.C. § 158(b)(1)(A) by attempting to coerce Mata into withdrawing her charge against it in Case Number 16-CB-181716.

#### V.

##### **There is No Competent Evidence that Local 28 Engaged in Unfair Labor Practices Against Donna Mata or otherwise Acted in any Unlawful or Discriminatory Manner with Regard to Donna Mata**

#### A.

##### **Who is Tim Harris**

Harris is Local 28's Business Agent/Secretary.<sup>16</sup> Harris has been in this position for twelve years.<sup>17</sup> As Business Agent/Secretary, Harris has numerous responsibilities. Harris assists in running the administrative business aspects of Local 28, is a member of the team negotiating contracts, deals with training and certification of workers, is involved with the dispatch of labor, handles payroll issues and child support orders, deals with subpoenas of records, assists generally in financial matters for the Local, and handles communication between employers and the WGMA.<sup>18</sup> When taking office as President, Larry Sopchak ("Sopchak") appointed Harris as Training Director.<sup>19</sup> As

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<sup>16</sup> TR p. 36, l. 21-24.

<sup>17</sup> TR p. 36, l. 25-p. 37, l. 1.

<sup>18</sup> TR p. 37, l. 2-6; TR p. 288, l. 9-24; TR p. 294, l. 4-7.

<sup>19</sup> TR p. 173, l. 21-p. 174, l. 1.

Training Director, Harris facilitates and coordinates the training and certification system between Local 28 and the WGMA.<sup>20</sup>

Outside of Harris' responsibilities with Local 28, Harris has been a City Councilman for the City of Morgan's Point, Texas since 2014 and is involved in other organizations.<sup>21</sup> Harris is married with four children ranging from 4 to 21.<sup>22</sup>

Mata accuses Harris of being a serial sexual assault perpetrator.

## **B.**

### **What is Local 28**

Local 28 provides a wide variety of workers to employers operating within the Port of Houston.<sup>23</sup> Local 28's workers are responsible for moving cargo after it is unloaded from ships in the Port of Houston.<sup>24</sup> This includes transportation, maintenance and repair, warehousing, and other tasks related to moving cargo.<sup>25</sup> Local 28 typically has some 600 workers at the Port of Houston.<sup>26</sup> By contrast, International Longshoremen's Association Local 24, which handles loading and unloading cargo from ships in the Port of Houston, typically has some 1,200 Longshoremen working.<sup>27</sup> Local 28 is holding elections for all elected positions in October 2017.<sup>28</sup> Sopchak has been Local 28's president for twelve years.<sup>29</sup>

Employers inform Local 28 of their needs and Local 28 seeks to fill those needs with workers. Those with seniority status are first offered the position. When positions

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<sup>20</sup> TR p. 174, l. 2-16; TR p. 174, l. 22-p. 175, l. 10; TR p. 175, l. 12-15.

<sup>21</sup> TR p. 288, l. 22-p. 289, l. 3; TR. p. 289, l. 7-9.

<sup>22</sup> TR p. 289, l. 11-15.

<sup>23</sup> TR p. 177, l. 1-11.

<sup>24</sup> TR p. 177, l. 1-11.

<sup>25</sup> TR p. 177, l. 1-11.

<sup>26</sup> TR p. 177, l. 17-24.

<sup>27</sup> TR p. 176, l. 18-25; TR p. 177, l. 17-22. Mata has obtained work through Local 24 and, if she so chose, could obtain training from WGMA through Local 24. RESP Ex. 7; TR p. 293, l. 5-9.

<sup>28</sup> TR p. 173, l. 9-18.

<sup>29</sup> TR p. 172, l. 22-p. 173, l. 5.

remain, they are offered to qualified individuals who do not have seniority; i.e. “casuals.”<sup>30</sup> The primary hiring time is 6:00 a.m. There are times there are not enough positions for all those seeking employment.<sup>31</sup> For example, a significant reduction in employment occurred during 2015-2016 due to a slow-down in the steel industry resulting in reduced steel shipments through the Port of Houston.<sup>32</sup> This slow-down did not alleviate until the first quarter of 2017.<sup>33</sup> This slow-down primarily impacted casual workers and those seeking employment through Local 28’s hiring hall.<sup>34</sup> In fact, during 2016, forklift and heavy lift jobs rarely, if ever, were available to casuals because they were typically filled with regular or dedicated workers or those with seniority.<sup>35</sup> Even so, truck driving positions, especially for individuals with Commercial Drivers Licenses, saw a slight increase in job availability.<sup>36</sup> Mata fell into this category.<sup>37</sup>

### **C.**

#### **The West Gulf Maritime Association Training System**

Patrick McKinney (“McKinney”) provided a description of the WGMA training procedures for individuals working through union locals such as Local 28. These procedures are also described in the West Gulf Maritime Association 2016 Training Manual.<sup>38</sup> As described in the Manual, WGMA, not Local 28:

As part of [its] administration, the West Gulf Maritime Association coordinates training on waterfront safety and policies, coordinates hands-on training in equipment, issues equipment certifications according to federal requirements, and manages training records.<sup>39</sup>

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<sup>30</sup> TR p. 184, l. 5-23; TR p. 201, l. 25 -p. 202, l. 6.

<sup>31</sup> TR p. 184, l. 24-p. 185, l. 2.

<sup>32</sup> TR p. 196, l. 16-p. 197, l. 14.

<sup>33</sup> TR p. 197, l. 15-25.

<sup>34</sup> TR p. 198, l. 15-25.

<sup>35</sup> TR p. 294, l. 8-p. 295, l. 1.

<sup>36</sup> TR p. 199, l. 1-20.

<sup>37</sup> TR p. 199, l. 11-20; TR p. 293, l. 17-p. 294, l. 3.

<sup>38</sup> RESP Ex. 3.

<sup>39</sup> RESP Ex. 3, p. ILA28-000021.

WGMA, not Local 28, tracks and maintains certifications in a list provided on its website.<sup>40</sup>

For the past 36 years, McKinney has been with Tri-Kin Enterprises (“Tri-Kin”) which provides powered industrial equipment and truck (“PIT”) training on behalf of the WGMA to union locals from Lake Charles, Louisiana to Brownsville, Texas.<sup>41</sup> This includes Local 28.<sup>42</sup>

Individuals taking the classes are assigned by WGMA.<sup>43</sup> “All classes are open to all qualified union workers. The class schedule is communicated via a monthly calendar posted on the [WGMA] website.”<sup>44</sup> Harris, of Local 28, does not tell Tri-Kin who will be in these classes.<sup>45</sup> Individual unions send sign up lists to WGMA which then vets the individuals listed and assigns individuals to a class.<sup>46</sup> For example, individuals must have attended a Longshore Skills class and a HazMat class within the first 90 days of working on the waterfront prior to attending other classes.<sup>47</sup> Class sizes are limited.<sup>48</sup> Mata concedes that availability of classes is paramount; only if a class is available would Harris place an individual on the list submitted to the WGMA.<sup>49</sup> Additionally, regular employees who are specifically requested for training by an employer have priority over

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<sup>40</sup> RESP Ex. 3, p. ILA28-000040.

<sup>41</sup> TR p. 237, l. 10-22; TR p. 239, l. 1-5.

<sup>42</sup> TR p. 237, l. 23-25.

<sup>43</sup> TR p. 239, l. 6-14.

<sup>44</sup> RESP Ex. 3, p. ILA28-000022.

<sup>45</sup> TR p. 255, l. 18-21.

<sup>46</sup> TR p. 239, l. 6-14.

<sup>47</sup> TR p. 239, l. 15-p. 240, l. 6; RESP Ex. 3, p. ILA28-000022-23 (“OSHA requires Hazardous Materials training and certification of every worker every three years. [49 CFR § 172.704(c)(2)]. If a worker does not maintain this certification, the worker cannot attend any additional training or work in the industry ... All newly hired longshore workers must attend this class [Longshore Skills] in order to participate in any other training.”). There are two exceptions, neither of which would have exempted Mata.

<sup>48</sup> TR p. 242, l. 9-11.

<sup>49</sup> TR p. 49, l. 2-8.

individuals who may be submitted by Local 28.<sup>50</sup> In addition, WGMA assigns a certain number of individuals from the various locals to the limited class slots.<sup>51</sup> A stand-by list may also be maintained allowing a student to attend if individuals on the list do not appear.<sup>52</sup>

With regard to Local 28's procedures, when the WGMA training dates are available, Harris makes an announcement of training availability during general announcements prior to general hiring at the end of the month previous to the scheduled classes.<sup>53</sup> This is done because, at times, the WGMA changes the schedule.<sup>54</sup> This announcement is made at the Monday morning hire which is typically the bulk of the week's hire.<sup>55</sup> If positions remain open, a second announcement may be made the following week.<sup>56</sup> Harris collects the names of those making themselves available for training.<sup>57</sup> Harris then sends that information to WGMA which vets the individuals identified to determine if they have the prerequisites for training.<sup>58</sup> If Harris knows a class to be full, he informs the individual of that fact.<sup>59</sup>

During 2016, Forklift and Heavy Lift training classes were well attended.<sup>60</sup> Houston classes for Forklift and Heavy Lift were offered once a month, generally in the first two weeks of the month.<sup>61</sup> The hands on portion of the certification process is

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<sup>50</sup> TR p. 175, l. 5-10; TR p. 298, l. 14-17; TR p. 299, l. 17-18.

<sup>51</sup> TR p. 241, l. 20-p. 242, l. 3; TR p. 175, l. 16-p. 176, l. 12.

<sup>52</sup> TR p. 241, l. 11-17.

<sup>53</sup> TR p. 39, l. 15-21; TR p. 42, l. 21-25.

<sup>54</sup> TR p. 41, l. 22-p. 42, l. 1.

<sup>55</sup> TR p. 39, l. 21-24.

<sup>56</sup> TR p. 39, l. 25-p. 40, l. 4.

<sup>57</sup> TR p. 39, l. 25-p. 40, l. 4; TR p. 43, l. 8-19.

<sup>58</sup> TR p. 40, l. 5-11.

<sup>59</sup> TR p. 40, l. 12-24.

<sup>60</sup> TR p. 242, l. 4-9.

<sup>61</sup> TR p. 242, l. 10-14; RESP. Ex. 9; GC Ex. 3.

scheduled during the class room portion.<sup>62</sup> Like the classroom portion, Local 28 has nothing to do with scheduling the hands on portion.<sup>63</sup> If an individual misses a classroom portion, they must wait 60 days to retake the class.<sup>64</sup> If an individual misses a hands on class, WGMA mandates they are ineligible to attend the class for 150 days.<sup>65</sup> If there is an emergency or some other excusable factor causing the absence, the individual may be excused from the 150 days waiting period.<sup>66</sup>

**D.**

**Michael Atwood's Testimony Provides no Evidence of Discriminatory Motive, Animus or Conduct by Local 28**

**1.**

***Who is Michael Atwood***

The General Counsel sought to independently evidence Mata's claims by presenting Michael Atwood ("Atwood"). Atwood began seeking jobs through Local 28 in 2015 and has been a Local 28 member since approximately November 2016.<sup>67</sup> Atwood obtained seniority status just six months prior to the hearing.<sup>68</sup> Atwood's seniority status is low, only nine individuals hold lower seniority.<sup>69</sup> Atwood rarely utilized Local 28's hiring hall as he was a regular employee reporting directly to his employer as a

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<sup>62</sup> TR p. 242 l. 15-p. 243, l. 7.

<sup>63</sup> TR p. 242, l. 8-10.

<sup>64</sup> RESP Ex. 3, p. ILA28-000024.

<sup>65</sup> TR p. 244, l. 23-p. 245 l. 6; RESP. Ex. 3, p. ILA28-000024.

<sup>66</sup> TR p. 245, l. 7-12.

<sup>67</sup> TR p. 21, l. 16-18; TR p. 15, l. 20-21.

<sup>68</sup> TR p. 16, l. 3-4.

<sup>69</sup> TR p. 16, l. 3-4; TR p. 29, l. 2-5; RESP Ex. 5 p. ILA28-000120.

mechanic.<sup>70</sup> Even after being laid off on March 13, 2017, Atwood sought employment through the Local 28 hiring hall only twice prior to the day of his testimony.<sup>71</sup>

## **2.**

### ***Atwood's Testimony Fails to Show any Discriminatory Conduct by Local 28***

Atwood sought to overcome his lack of presence by asserting he had been to the hiring hall and seen Mata some “couple dozen” times since January 1, 2016.<sup>72</sup> Even assuming these occurrences were on separate days, this comprises, at best, a small fraction of the work days since January 1, 2016. As such, Atwood’s opportunity to obtain personal knowledge was extremely limited. This was proven by his testimony.

Given his limited personal knowledge, the best Atwood offers is an **assumption** that Mata did not receive training because she is a woman.<sup>73</sup> Atwood’s assumption is based only on what Mata reportedly told him, his belief that other individuals obtained training Mata reportedly told Atwood she sought, and that women sought and obtained training through entities other than Local 28.<sup>74</sup> An assumption based on what Mata claims to be fact and that other locals sent women to training provides absolutely no credible evidence of discriminatory motive, animus, or conduct by Local 28 towards Mata individually or concerning women in general.

Surprisingly, given that Atwood’s purpose was to evidence gender discrimination against women, Atwood testified that he, a male, also encountered difficulty obtaining training through Local 28. In addition to evidencing that training was difficult to come

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<sup>70</sup> TR p. 22, l 4-16; TR p. 295, l. 5-p. 296, l. 3. A regular employee is an individual who is hired directly by the employer with a guaranteed 40-hour week and other benefits. A regular employee does not utilize the hiring hall because they are fully employed. TR p. 296, l. 4-19.

<sup>71</sup> TR p. 23, l. 13-p. 24, l. 2.

<sup>72</sup> TR p. 24, l. 6-19.

<sup>73</sup> TR p. 18, l. 14-16.

<sup>74</sup> TR p. 17, l. 17-24; TR p. 18, l. 17-23.



by regardless of sex, Atwood once more demonstrated his limited knowledge. The full extent of Atwood's effort to obtain training through Local 28 occurred over a 30 day period during June and July 2015.<sup>75</sup> At that time, like Mata, Atwood was a "casual."<sup>76</sup> Atwood was told he needed to have worked at least a day resulting from a Local 28 dispatch in order to use one of the Local 28 training slots available through the WGMA.<sup>77</sup> The reason for this is the cost associated with training.<sup>78</sup> As Atwood testified, as a casual, there were simply times that other individuals might obtain a job to his exclusion due to their prior experience or training.<sup>79</sup> Thus, Atwood's difficulty in obtaining employment and training is not remarkable, particularly as his effort was limited to a short time during June and July 2015.

Interestingly and contradicting his testimony concerning his assumptions, Atwood testified that an unnamed man starting soon after him with Local 28 obtained truck driving/yard tractor training "quicker than anybody [he'd] ever seen."<sup>80</sup> Of course, Mata obtained yard tractor training through Local 28 within weeks of her May 14, 2015 return to the waterfront.<sup>81</sup> Mata's first yard tractor job occurred on July 14, 2015, just eight weeks after her return to the waterfront.<sup>82</sup> It appears, based on Atwood's testimony and the timing of Mata's strikingly similar experience to the unnamed male, that Local 28 was equally efficient in securing yard tractor training for men and women.

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<sup>75</sup> TR p. 25, l. 5-25.

<sup>76</sup> TR p. 16, l. 3-7; TR p. 27, l. 4-7.

<sup>77</sup> TR p. 9-18; TR p. 26, l. 4-9.

<sup>78</sup> TR p. 42, l. 12-16.

<sup>79</sup> TR p. 27, l. 8-24; TR p. 28, l. 10-13.

<sup>80</sup> TR p. 21, l. 4-8; TR p. 21, l. 13-15; TR p. 21, l. 24-25.

<sup>81</sup> RESP Ex. 2; RESP Ex. 7, p. ILA28-00153.

<sup>82</sup> RESP Ex. 7, p. ILA28-00153.

Atwood testified he observed women obtain employment through Local 28 both as casuals and under the seniority system.<sup>83</sup> Despite this, Atwood asserts Mata was subject to gender discrimination because he observed two men obtain employment as casuals rather than two women who were casuals. Atwood admits he has no idea why these two individuals may have been dispatched.<sup>84</sup> Atwood acknowledges that there may have been a basis other than gender at play in the dispatch; noting the individuals' training.<sup>85</sup> Atwood sought to extrapolate from this that the two women did not have the correct training because they were denied training by Local 28. Atwood provides no evidence for this other than the fact that the two women took his advice and obtained training through a different local.<sup>86</sup> Atwood also attempted to find evidence of discrimination through his observation that men "frequently" received training.<sup>87</sup> This is not surprising and of no import given the makeup of the work force.<sup>88</sup>

In sum, Atwood's testimony did nothing to advance Mata's discrimination charge. Rather, Atwood's testimony countered Mata's charges. Because Atwood provided nothing, any evidence of discrimination must come from Mata herself.

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<sup>83</sup> TR p. 29, l. 16-p. 30, l. 1.

<sup>84</sup> TR p. 30, l. 18-22.

<sup>85</sup> TR p. 30, l. 23-p. 31, l. 2; TR p. 31, l. 6-9.

<sup>86</sup> TR p. 32, l. 13-14; p. 33, l. 1-5.

<sup>87</sup> TR p. 18, l. 23-p. 19, l. 5.

<sup>88</sup> TR p. 314, l. 16-25; p. 316, l. 12-p. 317, l. 3.

**E.**

**Local 28 Neither Subjected Donna Mata to Arbitrary, Discriminatory, or Bad Faith Treatment with Regard to Access to Training nor Breached its Fiduciary Duty to Mata**

**1.**

***Who is Donna Mata***

Mata began obtaining employment through Local 28 in 2001.<sup>89</sup> Mata received her WGMA certifications through Local 28.<sup>90</sup> From November 2007 through June 2010, Mata was employed as a truck driver in Iraq.<sup>91</sup> Mata claims that on her return from Iraq, she went to Local 28 seeking employment and certification.<sup>92</sup> Mata claims her effort was met by an “assault” by Harris, so she chose to obtain employment elsewhere.<sup>93</sup>

Interestingly, given her claims in this matter, Mata received HazMat classroom training through Local 28 on April 1, 2010.<sup>94</sup> Therefore, it appears Mata returned to Local 28 prior to June 2010 and was, despite her claims, able to obtain training. In April 2010, Mata still possessed certifications as a Trained Worker and in Lashing, although, on April 1, 2010, her other prior certifications expired.<sup>95</sup>

Between June 2010 and February 2015, Mata was employed full time by various trucking companies.<sup>96</sup> These were not jobs obtained through Local 28.<sup>97</sup> Even though she was employed with only four or five gaps between jobs, Mata asserts she returned to Local 28 seeking employment approximately ten times between the summer of 2010

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<sup>89</sup> TR p. 46, l. 4-5.

<sup>90</sup> RESP Ex. 2.

<sup>91</sup> TR p. 76, l. 24- p. 77, l. 9.

<sup>92</sup> TR p. 80, l. 21-p. 81, l. 1.

<sup>93</sup> TR p. 81, l. 2-9.

<sup>94</sup> RESP Ex. 2.

<sup>95</sup> RESP Ex. 2.

<sup>96</sup> TR p. 77, l. 10-p. 78, l. 4; TR p. 79, l. 15-20.

<sup>97</sup> TR p. 78, l. 5-9.

and February 2015.<sup>98</sup> Mata claims that each time Harris attempted to “grab on me” so she “wouldn’t come back for a while.”<sup>99</sup> Mata asserts this was a “never ending cycle” over the nearly five year period.<sup>100</sup> While Mata claims she was a victim of repeated sexual assault by Harris, she is not aware of any other allegations or complaints concerning sexual harassment by Harris.<sup>101</sup>

Mata believes her last employment outside Local 28 ended around Easter 2015.<sup>102</sup> Mata’s first renewed employment through Local 28 occurred on May 14, 2015.<sup>103</sup> Without apparent incident, Mata obtained Longshore Skills and HazMat certification on June 8, 2015, Yard Tractor certification on June 11, 2015, and passed her physical on July 6, 2015.<sup>104</sup> While she denies it, after Mata’s return in 2015, she accepted fork lift jobs even though she was not certified and should not have accepted the positions.<sup>105</sup> Mata accepted fork lift jobs in Houston with Shippers Stevedoring through Local 28 on July 9-10, 2015 and fork lift jobs in Port Arthur with SSA Gulf through Local 440 on September 1-4, 2015.<sup>106</sup> Since that time, Mata has accepted truck driving jobs almost exclusively.<sup>107</sup> This held true even after Mata obtained certification on Ro/Ro, Forklift, and Heavy Lift in August and September 2016.<sup>108</sup> It also held true

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<sup>98</sup> TR p. 82, l. 2-19.

<sup>99</sup> TR p. 85, l. 18-23; TR p. 87, l. 8-13.

<sup>100</sup> TR p. 85, l. 24-p. 86, l. 1.

<sup>101</sup> TR p. 157, l. 1-4.

<sup>102</sup> TR p. 78, l. 10- p. 79, l. 2; TR p. 79, l. 21-24; TR p. 79, l. 21-24.

<sup>103</sup> RESP Ex. 7, p. ILA28-000153.

<sup>104</sup> RESP Ex. 2.

<sup>105</sup> TR p. 92, l. 4-5; RESP Ex. 3, p. ILA28-000024 (“Every longshore worker who operates a PIT must be certified through the [WGMA] prior to accepting any employment on this equipment.”).

<sup>106</sup> RESP 7 p. ILA28-00152-53.

<sup>107</sup> TR p. 46, l. 10-21; TR p. 95, l. 4-7; TR p. 178, l. 13-20; RESP Ex. 7 pp. ILA28-000147-53; RESP. Ex. 6.

<sup>108</sup> See RESP Ex. 7 pp. ILA28-000147-53; RESP. Ex. 6; RESP. Ex. 2.

when Mata obtained employment through International Longshoremen's Association Local 24.<sup>109</sup>

Despite obtaining employment through Local 28 since 2001, Mata remains a "casual."<sup>110</sup> Mata's presence at Local 28's hiring hall to obtain employment was sporadic in 2016.<sup>111</sup> If a worker fails to obtain seniority status, they are classified as a "casual worker."<sup>112</sup> In order to achieve seniority status, an individual must work at least 1,000 hours each calendar year.<sup>113</sup> Mata has never reached the work requirements for seniority status.<sup>114</sup> In fact, Mata has only worked a total of 1,412.50 hours with several locals since March 2007.<sup>115</sup>

## **2.**

### ***Contrary to Mata's Claim of Difficulty Obtaining Training Since 2010, the Evidence Shows She Received Timely Training***

Mata asserts she encountered difficulty obtaining training since 2010, although, in addition to being employed elsewhere between 2010 and 2015, Mata received HazMat training through Local 28 in April 2010.<sup>116</sup> Mata also received HazMat, Longshore Skills, and Yard Tractor training in June 2015.<sup>117</sup>

Harris recalls Mata seeking employment and training on her return in 2015.<sup>118</sup> Setting a pattern, by the time Mata approached Harris requesting training, many of the courses had already occurred for the month and the Yard Tractor course was already

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<sup>109</sup> See RESP. Ex. 7 p. ILA28-000148 (December 29, 30, 2016, January 3, 2017).

<sup>110</sup> TR p. 48, l. 1-3; TR p. 293, l. 13-16.

<sup>111</sup> TR p. 271, l. 21-25.

<sup>112</sup> TR p. 183, l. 15-19.

<sup>113</sup> TR p. 179, l. 19-p. 179, l. 9.

<sup>114</sup> TR p. 46, l. 14-16; TR p. 182, l. 11-15.

<sup>115</sup> RESP Ex. 7.

<sup>116</sup> TR p. 53, l. 18-19; RESP Ex. 2.

<sup>117</sup> RESP Ex. 2.

<sup>118</sup> TR p. 296, l. 20-p. 297, l. 14.

“capped out.”<sup>119</sup> On June 5, 2015 Harris sent an e-mail to Judith Brown, the WGMA individual responsible for compiling class lists, informing her that Mata was on stand-by for the Yard Tractor course.<sup>120</sup> Mata did not request to be placed on the stand-by list.<sup>121</sup> Harris took it upon himself to arrange for her to be on the stand-by list.<sup>122</sup> Mata successfully attended Longshore Skills training, which was a requirement on her return to the waterfront, and Yard Tractor training.<sup>123</sup>

Harris recalls additional occurrences when Mata inquired about training. The first occurrence was at the conclusion of a general union meeting.<sup>124</sup> The meeting occurred on October 7, 2015 and Mata is reflected to have attended.<sup>125</sup> Meetings were held the first or second week of the month and by that time, classes were either full or had already occurred.<sup>126</sup> As a result, Harris told Mata to get back to him the following month.<sup>127</sup> In large part because the WGMA did not finalize class schedules until late in the month, Harris did not collect names for training courses until the first part of the month the classes were scheduled to occur in.<sup>128</sup> Harris did not maintain a running list.<sup>129</sup> In October 2015, RoRo and Forklift training occurred on October 6, 2015.<sup>130</sup> Thus, there was no opportunity to attend these classes until November 2015 at the earliest. Heavy Lift training was scheduled for October 8, 2015.<sup>131</sup> Harris had already submitted the list for Heavy Lift training because he sends them to WGMA 48 hours

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<sup>119</sup> TR p. 300, l. 13-17.

<sup>120</sup> RESP Ex. 13; TR p. 296, l. 25-p. 297, l. 14; TR p. 298, l. 5-p. 29, l. 4.

<sup>121</sup> TR p. 300, l. 10-12.

<sup>122</sup> TR p. 300, l. 13-20.

<sup>123</sup> TR p. 296, l. 20-p. 297, l. 14.

<sup>124</sup> TR p. 302, l. 18-p. 303, l. 5.

<sup>125</sup> TR p. 304, l. 25-p. 305, l. 3; RESP Ex. 12, p. ILA28-000165.

<sup>126</sup> TR p. 303, l. 6- 15.

<sup>127</sup> TR p. 303, l. 14-15.

<sup>128</sup> TR p. 303, l. 16-p. 304, l. 12.

<sup>129</sup> TR p. 304, ,l. 10-12.

<sup>130</sup> RESP Ex. 18, p. ILA28-000199.

<sup>131</sup> RESP Ex. 18, p. ILA28-000199.

prior to the scheduled class.<sup>132</sup> As a result, the only option available was to go to the WGMA the day of the class and attempt to attend as a stand-by.<sup>133</sup> This, of course, is what Mata did in June 2015 when she previously belatedly sought training. In response to a third belated request by Mata in 2016, which was made the day of a class, Harris told Mata she could attempt to get in off the stand-by list by going to the WGMA.<sup>134</sup> Harris did not know whether Mata attempted to attend or not.<sup>135</sup>

These are the only three times Harris recalls Mata inquiring of him about attending training. This evidences a pattern by Mata. Mata requested to attend training classes late. By the time she inquired, the classes had passed or her only option was to attempt to attend by standing by or, as Harris admits to telling Mata on one occasion, see him the following month.

### 3.

#### ***Mata Offers no Competent Evidence of Gender Discrimination***

Mata concedes women were placed on training lists.<sup>136</sup> Mata claims, however, that she was discriminatorily denied placement “four to six times every month” between March and August 2016.<sup>137</sup> Mata may have made this number of inquiries. However, as evidenced by Mata’s three belated efforts *supra*, she was not prone to following the process. As Harris noted, he only prepares lists once a month because the WGMA schedule often changes, individuals don’t plan that far ahead, and addressing scheduling

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<sup>132</sup> TR p. 312, l. 6-10.

<sup>133</sup> TR p. 3312, l. 11-p. 313, l. 10.

<sup>134</sup> TR p. 313, l. 11-20.

<sup>135</sup> TR p. 313, l. 17-20.

<sup>136</sup> TR p. 52, l. 3-7.

<sup>137</sup> TR p. 49, l. 9-15.

at a bulk hire allows him to catch the most workers.<sup>138</sup> Thus, if Mata did not take it upon herself to timely bring it to his attention, she would not have been listed.

Regardless, Mata offered several reasons for the alleged denial which she contends shows they were discriminatory. Mata testified she was told she could get plenty of truck driving work, that truck driving jobs pay better, and that she should have her husband come in as well so the family would have two incomes.<sup>139</sup> Each of these observations is accurate. As detailed *supra*, even with additional certifications, Mata has accepted truck driving jobs regularly and almost exclusively.<sup>140</sup> Truck driving jobs were more plentiful and regular.<sup>141</sup> Truck driving jobs did, in fact, pay better than forklift jobs.<sup>142</sup> It is obvious that if Mata's husband chose to work, the family would enjoy two incomes. The only reason expressed which even remotely touches on alleged gender perception is Mata's claim that she was told that non-truck driving jobs were "grimy, dirty jobs and it's too much physical work."<sup>143</sup> However, to portray this alleged comment as anything other than a general observation or stray remark requires more than the evidence permits.<sup>144</sup>

Mata seeks to establish discriminatory animus or conduct by Local 28 by pointing to the ten times she claims Harris "grab[bed her] breasts."<sup>145</sup> When Mata told San Miguel, Jr. of this on July 30, 2016, she described it as "brushing up against her

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<sup>138</sup> TR p. 303, l. 24-p. 304, l. 9.

<sup>139</sup> TR p. 50, l. 23-p. 51, l. 1; TR p. 57, l. 24- p. 58, l. 4; TR p. 58, l. 4- p. 59, l. 25.

<sup>140</sup> RESP Ex. 7.

<sup>141</sup> TR p. 199, l. 1-20.

<sup>142</sup> RESP Ex. 7 (compare the July 10, 2015 forklift job (314) paying \$232.00 for 8 hours (\$29.00 per hour), the July 14, 2015 truck driver job (321) paying \$66.50 for 2 hours (\$33.50 per hour), the truck driver job (321) on July 24, 2015 paying \$266.00 for 8 hours (\$33.25 per hour), and the August 7, 2015 truck driver job (241) paying \$234.00 for 8 hours (\$29.25 per hour).

<sup>143</sup> TR p. 51, l. 8-11.

<sup>144</sup> See *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 380 (5<sup>th</sup> Cir. 2010).

<sup>145</sup> TR p. 60, l. 22-25.



breasts.”<sup>146</sup> San Miguel, Jr. does not recall Mata describing it as anything more forceful.<sup>147</sup> Mata alleges these events occurred during the meetings between 2010 and 2015 in which she claims to have sought training.<sup>148</sup> Mata testified that the last time this occurred was in 2015, “after Easter, right before Mother’s Day.”<sup>149</sup> Easter fell on April 5, 2015 and Mother’s Day was May 10, 2015.<sup>150</sup>

Mata’s first day of employment through Local 28 since 2007 occurred on May 14, 2015.<sup>151</sup> Mata received Longshore and HazMat certification on June 8, 2015, Yard Tractor class room certification on June 11, 2015, and Yard Tractor hands on certification on June 30, 2015.<sup>152</sup> The Longshore and HazMat certifications were required prior to Mata being able to take any other classes, including Yard Tractor.<sup>153</sup> By June 30, 2015, Mata had obtained five dispatches for employment through Local 28.<sup>154</sup> Thus, just weeks after the last alleged event occurred, Mata was not only employed but trained. As discussed *supra*, Harris took it upon himself to place Mata on the stand-by list for Yard Tractor training in June 2015.

If Mata’s theory is she was denied training because she rejected Harris, the evidence shows that no retaliation occurred as she obtained employment and training immediately after she alleges she last rejected Harris. While Mata asserts she was denied training between January 1 and August 1, 2016, in addition to there being no evidence of such denial other than Mata’s unsubstantiated claims, it makes no logical

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<sup>146</sup> TR p. 280, l. 16-25.

<sup>147</sup> TR p. 281, l. 1-3.

<sup>148</sup> TR p. 60, l. 4-13; TR p. 60, l. 14-16; TR p. 60, l. 22-25.

<sup>149</sup> TR p. 60, l. 17-21.

<sup>150</sup> Respondent respectfully requests the Administrative Law Judge take Judicial Notice of these dates pursuant to Federal Rule of Evidence 201 as made applicable by 29 C.F.R. § 102.39.

<sup>151</sup> RESP. Ex. 7 p. ILA28-000153; RESP Ex. p, ILA128-000124.

<sup>152</sup> RESP Ex. 2; TR p. 94, l. 17-p. 95, l. 3.

<sup>153</sup> TR p. 94, l. 9-20.

<sup>154</sup> RESP Ex. 7, p. ILA28-00153 (May 14-June 23, 2015).

sense that Harris waited eight months to retaliate after not retaliating against her by taking it upon himself to secure her a stand-by slot for training in June 2015. Just as critically, Mata offers no evidence of any “assault” between January 1 and August 1, 2016, the time period she alleges she was subjected to discriminatory denial of training. While Local 28 and Harris strenuously deny Mata’s allegations of sexual assault, even if only one such event occurred, Mata fails to connect her alleged denial of training to it.

#### 4.

#### ***Local 28 Immediately Addressed Mata’s Report of Sexual Assault and Denial of Training***

Mata did not report Harris’ alleged conduct to Local 28 until July 2016, over a year after she claims it last occurred.<sup>155</sup> On June 30, 2016, Mata told San Miguel, Jr, who, in turn, reported the allegation to Local 28’s president, Sopchak, on July 1, 2016.<sup>156</sup> Mata did not mention anything about being denied training or any other conduct by Local 28 to San Miguel, Jr.<sup>157</sup> Mata routinely spoke with San Miguel, Jr. concerning union related and personal matters.<sup>158</sup>

The same day he learned of the allegations, July 1, 2016, Sopchak requested San Miguel, Jr. contact Mata to set up a meeting to address them.<sup>159</sup> Mata, San Miguel, Jr. and B.R. Williams, Local 28’s Executive Vice President, attended the meeting.<sup>160</sup> Even during that meeting, Mata did not mention denial of training or certification

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<sup>155</sup> TR p. 61, l. 1-19.

<sup>156</sup> TR p. 61, l. 10-20; TR p. 263, l. 24-p. 265, l. 10; TR p. 172, l. 22-24; TR p. 212, l. 24-p. 213, l. 2.

<sup>157</sup> TR p. 265, l. 18-25; p. 213, l. 3-17; TR p. 214, l. 16-20.

<sup>158</sup> TR p. 63, l. 19-25.

<sup>159</sup> TR p. 216, l. 5-16.

<sup>160</sup> TR p. 214, l. 21-p. 215, l. 10.

opportunities to Sopchak's recollection.<sup>161</sup> Mata was also invited, if she so chose, to have the WGMA address her harassment charges independently.<sup>162</sup> Mata declined.<sup>163</sup>

A second meeting to address Mata's allegations was held on July 6, 2016.<sup>164</sup> That meeting primarily involved Mata and Local 28's counsel, Eric Nelson ("Nelson").<sup>165</sup> Sopchak attended the preliminary portion of the meeting but removed himself to provide a more comfortable venue for Mata.<sup>166</sup>

During the meetings, Mata expressed a desire to obtain training but did not want to work through Harris.<sup>167</sup> Mata also wanted an adjustment to her pay level.<sup>168</sup> Mata was told Local 28 would try to get her into the next available training classes and that she could speak with San Miguel, Jr. or any Local 28 official other than Harris concerning training.<sup>169</sup>

Local 28 secured a spot for Mata in a July 8, 2016 Forklift training class, notifying Mata through San Miguel, Jr. on July 7, 2016.<sup>170</sup> Despite being afforded this opportunity, Mata declined, asserting she was unable to attend on short notice.<sup>171</sup> The next opportunities for Ro-Ro training did not arise until August 2, 2016 and training in Forklift and Heavy Lift would not occur again until August 4, 2016.<sup>172</sup> Mata availed herself of these opportunities.<sup>173</sup> Mata testified that she knew she was in these classes

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<sup>161</sup> TR p. 215, l. 18- p. 217, l. 1; TR p. 217, l. 16-22.

<sup>162</sup> TR p. 123, l. 20-p. 124, l. 10.

<sup>163</sup> TR p. 224, l. 1-10.

<sup>164</sup> TR p. 218, l. 12-23.

<sup>165</sup> TR p. 218, l. 12-23.

<sup>166</sup> TR p. 218, l. 12-p. 219, l. 6.

<sup>167</sup> TR p. 267, l. 13-22.

<sup>168</sup> TR p. 263, l. 29-22.

<sup>169</sup> TR p. 267, l. 23-p. 268, l. 6; TR p. 216, l. 17-p. 217, l. 2; TR p. 217, l. 9-15; TR p. 217, l. 23-p. 218, l. 2.

<sup>170</sup> RESP Ex. 21, p. ILA28-000218; TR p. 212, l. 1-8; RESP Ex. 9, p. ILA28-000141; TR p. 156, l. 11-24.

<sup>171</sup> RESP Ex. 21, p. ILA28-000218.

<sup>172</sup> RESP Ex. 9, p. ILA28-000142; TR p. 133, l. 5-25; TR p. 134, l. 19-23.

<sup>173</sup> RESP Ex. 2; TR p. 95, l. 8-p. 96, l. 2.

“at least a couple days before the classes,” i.e., on short notice.<sup>174</sup> As McKinney testified, Mata knew on the day of the classroom portion when she was scheduled to complete the hands-on portions.<sup>175</sup>

In contrast to the facts, Mata asserts that after these meetings she “never heard anything back at all.”<sup>176</sup>

Despite Local 28’s efforts, on August 5, 2016, Mata filed Charge Number 16-CB-181716 against Local 28 asserting it had unlawfully refused to allow her on the “certification list.”<sup>177</sup> As a result, on the day Mata filed her charges against Local 28 asserting it prevented her from obtaining training, she had turned down the opportunity to attend one class in July 2016, had taken the first available classes since she brought the matter to Local 28’s attention, and was scheduled for the hands-on portions of the classes she alleged Local 28 prevented her from attending.

While Mata attended RoRo class room training on August 2, 2016 and Forklift and Heavy Lift training on August 4, 2016, she was ill on the first day of hands-on training on August 8, 2016.<sup>178</sup> Mata agrees she was ill on August 8, 2016 when the RoRo hands on class was scheduled.<sup>179</sup> Mata was told by McKinney to go home and, when she was well, he would reschedule her.<sup>180</sup> Mata was offered slots in hands on classes in Fork Lift, RoRo, and Heavy Lift on August 17, 2016. Through San Miguel, Jr. Mata declined.<sup>181</sup>

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<sup>174</sup> TR p. 135, l. 5-20.

<sup>175</sup> TR p. 242 l. 15-p. 243, l. 7.

<sup>176</sup> TR p. 63, l. 9-14.

<sup>177</sup> GC Ex. 1(a); TR p. 97, l. 3-17.

<sup>178</sup> RESP Ex. 2; TR p. 247, l. 12-21; TR p. 248, l. 18-p. 249, l.2; RESP Ex. 10. TR p. 247, l. 12-21; TR p. 248, l. 18-p. 249, l.2; RESP Ex. 10.

<sup>179</sup> TR p. 101, l. 23-p. 102, l. 2.

<sup>180</sup> TR p. 247, l. 12-21.

<sup>181</sup> RESP Ex. 10 p. ILA28-000004; TR p. 251, l. 22-p. 252, l. 5; p. 252, l. 16-22; p. 252, l. 23-p. 253 l. 3; TR p. 279, l. 9-p. 280 l. 3.

Mata's portrayal of this event is that, while she did vomit, she was not sick. Yet McKinney refused to permit her to attend the hands-on classes.<sup>182</sup> In order to connect this event to her alleged discriminatory treatment, Mata attributes the refusal to Local 28.<sup>183</sup> No one with Local 28 requested McKinney prevent Mata from completing her hands-on certifications.<sup>184</sup> McKinney was solely responsible for sending Mata home due to her illness in August 2016.<sup>185</sup> In addition to protecting the other students and the equipment, McKinney wanted her to be in "tip top" shape because if she failed, she was required to wait 60 days to try again.<sup>186</sup>

It is apparent that, despite Mata's claims, Local 28 immediately addressed her claims once it was made aware of them and took concrete steps to assist Mata. Local 28 secured the very training Mata claimed she was being denied. There is, quite simply, no basis for a claim that Local 28 was discriminatory in addressing Mata's complaints regarding Harris or the alleged denial of training opportunities.

## **F.**

### **Local 28 did not Attempt to Coerce Donna Mata into Withdrawing her Unfair Labor Practice Charge in Case 16-CB-181716**

#### **1.**

#### ***Mata and San Miguel, Jr. are Related and Routinely Discussed her Concerns Throughout this Matter***

On March 8, 2017, Mata presented a new charge, alleging that Local 28, through San Miguel, Jr., attempted to coerce her into withdrawing her initial charge.<sup>187</sup> Mata

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<sup>182</sup> TR p. 103, l. 11-18.

<sup>183</sup> TR p. 104, l. 12-16.

<sup>184</sup> TR p. 249, l. 20-p. 250, l. 6

<sup>185</sup> TR p. 250, l. 11-13.

<sup>186</sup> TR p. 254 l. 18-p. 255 l. 5.

<sup>187</sup> GC Ex. 1 (f).

has known San Miguel, Jr. for many years.<sup>188</sup> San Miguel, Jr. testified he has known Mata “since [they] were kids, basically.”<sup>189</sup> Mata is San Miguel, Jr.’s step-mother’s niece.<sup>190</sup> Mata routinely communicated with San Miguel, Jr. concerning union related and personal matters.<sup>191</sup> Mata communicated with San Miguel, Jr. in person, via phone, and via text.<sup>192</sup> Mata discussed her allegations against Local 28 with San Miguel, Jr.<sup>193</sup> Mata also discussed approaching the Equal Employment Opportunities Commission (“EEOC”) with San Miguel, Jr. in August 2016 based on her mistaken belief that Local 28 did nothing concerning her complaints.<sup>194</sup> Despite this long history and involvement, Mata alleges San Miguel, Jr.’s continued concern constituted an attempt to coerce her into withdrawing her initial charge.

## **2.**

### ***Mata’s Portrayal of her Discussions with San Miguel, Jr.***

Mata points to several conversations with San Miguel, Jr as evidence that Local 28 sought to coerce her into withdrawing her charge. The first communication Mata points to occurred on August 3, 2016. On that date, San Miguel, Jr. sent a text to Mata concerning the NLRB.<sup>195</sup> At that time, San Miguel, Jr. did not know whether Mata had filed any charges with the NLRB.<sup>196</sup> Yet, Mata insists the August 3, 2016 text, which predates her charge, was sent to get her to withdraw it.<sup>197</sup>

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<sup>188</sup> TR p. 125, l. 14-20.

<sup>189</sup> TR p. 260, l. 12-16.

<sup>190</sup> TR p. 63, l. 15-18; TR p. 125, l. 5-13; TR p. 260, l. 12-16.

<sup>191</sup> TR p. 63, l. 19-25.

<sup>192</sup> TR p. 63, l. 24-25.

<sup>193</sup> TR p. 124, l. 25-p. 125, l. 3.

<sup>194</sup> TR p. 132, l. 10-p. 133, l. 4.

<sup>195</sup> GC Ex. 5

<sup>196</sup> GC Ex. 5; TR p. 270, l. 18-22.

<sup>197</sup> TR p. 126, l. 1-23.

Mata testified that San Miguel, Jr. again inquired, during a five-minute conversation on December 7, 2016, “if I would – if I’d dropped the charges or if I’m going to keep the charges.”<sup>198</sup> Mata asserts she told San Miguel, Jr. in December 2016, “I don’t believe I would drop the charges.”<sup>199</sup> There was no further conversation.<sup>200</sup>

Mata testified that a third conversation occurred on December 8, 2016.<sup>201</sup> During another five-minute conversation, Mata asserts San Miguel, Jr. asked her if she had contacted the NLRB to drop the charges.<sup>202</sup> Mata asserts she replied she had tried but had not been able to “get through.”<sup>203</sup>

Mata testified of a fourth conversation on December 15, 2016.<sup>204</sup> Mata received another text message inquiring whether she had “gone down to withdraw the charges at the Labor Board.”<sup>205</sup>

Mata then referenced a fifth conversation with San Miguel, Jr. in February 2017.<sup>206</sup> During that conversation, Mata asserts San Miguel, Jr. again inquired about her dropping the charges and Mata replied, “no, I haven’t been able – I’ve been trying to get a hold of Laurie [Duggan-counsel for the NLRB] for a while already because I needed to talk to her about stuff. And I just haven’t been able to get through, ...”<sup>207</sup> Mata testified this conversation occurred in San Miguel, Jr.’s office with the door open after she received a job dispatch.<sup>208</sup> Mata claims San Miguel, Jr. took the job dispatch from

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<sup>198</sup> TR p. 70, l. 3-5; TR. p. 68, l. 1-15.

<sup>199</sup> TR p. 68, l. 17-19.

<sup>200</sup> TR p. 70, l. 6-8.

<sup>201</sup> TR p. 70, l. 9-14.

<sup>202</sup> TR p. 71, l. 1-6; TR. p. 69, l. 25-p. 70, l. 2 (Mata testified that her meetings “usually” lasted “about five minutes.”).

<sup>203</sup> TR p. 71, l. 1-6.

<sup>204</sup> TR p. 71, l. 12-17.

<sup>205</sup> TR p. 71, l. 12-17.

<sup>206</sup> TR p. 72, l. 10-19.

<sup>207</sup> TR p. 73, l. 6-17.

<sup>208</sup> TR. p. 72, l. 20-p. 73, l. 2; TR p. 73, l. 8-12.

her, telling her to go to the NLRB office and wait for Duggan.<sup>209</sup> Mata testified she did, in fact, go to the NLRB office that day and met with Duggan and, rather than discuss withdrawing the charges, told Duggan that Local 28 was inquiring about the withdrawal of the charges.<sup>210</sup> On March 8, 2017, Mata filed the new charge against Local 28 alleging it had attempted to coerce her into withdrawing her charges in Case Number 16-CB-181716.<sup>211</sup>

Mata contends she never intended to withdraw her charges.<sup>212</sup> This makes San Miguel, Jr.'s repeated inquiries confounding. If Mata did not express an intent to drop the charges and informed San Miguel, Jr. of this, San Miguel, Jr. would have no reason to inquire and Mata would not have told him she had not been able to “get through” to the National Labor Relations Board (“NLRB”). This suggests that Mata’s affirmative denial of any intent to withdraw the charges was either not true or was not communicated to San Miguel, Jr. Mata concedes she told San Miguel, Jr. she “was not sure how far she wanted to pursue” the matter.<sup>213</sup> This is confirmed by San Miguel, Jr.’s testimony. This testimony establishes that not only did San Miguel, Jr. not seek to coerce Mata into withdrawing her charge, but that Mata expressed an interest in doing so. Additionally, the conversations arose from San Miguel, Jr.’s personal relationship to Mata and the ongoing settlement discussions between the NLRB and Local 28.

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<sup>209</sup> TR p. 72, l. 17-25. San Miguel, Jr. has no recollection of taking work ticket from Mata. TR. p. 261, l. 11-14.

<sup>210</sup> TR. p. 74, l. 5-11.

<sup>211</sup> GC Ex. 1(f).

<sup>212</sup> TR p. 71, l. 9-11; TR p. 70, l. 6-8; TR p. 74, l. 12-15.

<sup>213</sup> TR p. 138, l. 4-8,



### **3.**

#### ***Who is Jesse San Miguel, Jr.***

San Miguel, Jr. has been a Local 28 member for 27 years.<sup>214</sup> San Miguel, Jr. has been Local 28's Business Agent/Treasurer for six years.<sup>215</sup> San Miguel, Jr. also serves as a Reserve Police Officer for the Harris County Constable, Precinct 2.<sup>216</sup> San Miguel, Jr. has served as a police officer for eighteen years.<sup>217</sup>

### **4.**

#### ***San Miguel, Jr.'s Recollection of His Conversations with Mata***

San Miguel, Jr. recalls having discussions with Mata concerning her NLRB charge beginning in December 2016 when he first learned of it.<sup>218</sup> These conversations arose after the November 30, 2016 Complaint and Notice of Hearing in Case 16-CB-181716 (the "Complaint").<sup>219</sup> San Miguel, Jr.'s father, Jesse San Miguel, Sr. is identified in the Complaint.<sup>220</sup> It was not until an NLRB settlement proposal was discussed among Local 28's Executive Board at an annual appreciation dinner that San Miguel, Jr. discussed the matter with Mata.<sup>221</sup> San Miguel, Jr. was concerned because his father was mentioned in connection with the matter.<sup>222</sup> Mata told San Miguel, Jr. that she just wanted to make sure she had no further problems with Harris, that she could get training, and wanted a different pay scale.<sup>223</sup> San Miguel, Jr. explained that she did not qualify for a different pay scale and that he was concerned about having his father

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<sup>214</sup> TR p. 259, l. 6-8.

<sup>215</sup> TR p. 259, l. 9-11.

<sup>216</sup> TR. p. 259, l. 21-24.

<sup>217</sup> TR p. 260, l. 2-5.

<sup>218</sup> TR p. 273, l. 20-24; TR p. 283, l. 14-25.

<sup>219</sup> GC Ex. 1(c).

<sup>220</sup> GC Ex. 1(c) ¶ 6.

<sup>221</sup> TR p. 280, l. 8-14.; TR. p. 273, l. 24-p. 274, l. 16; . 24-p. 275, l. 4.

<sup>222</sup> TR p. 274, l. 18-23.

<sup>223</sup> TR p. 274, l. 4-12.

mentioned in something he did not have any involvement in.<sup>224</sup> Mata stated she did not want that to happen and asked “what was the next best thing.”<sup>225</sup> San Miguel, Jr. told Mata he thought she had gotten everything she requested during the July 2016 meetings so she could just drop the charges.<sup>226</sup> Mata indicated she was not interested in money and had obtained the desired training.<sup>227</sup> Mata indicated she was going to withdraw the charges.<sup>228</sup> San Miguel, Jr. shared this with Sopchak.<sup>229</sup> Local 28 did provide information to Mata about who she needed to speak with concerning withdrawing the charges but, other than provide that information, took no other steps concerning the withdrawal.<sup>230</sup> San Miguel, Jr. followed up with Mata but she told him she was having difficulty getting ahold of the NLRB.<sup>231</sup> San Miguel, Jr. asked Mata to keep him updated.<sup>232</sup>

San Miguel, Jr. does not recall telling Mata to go to the NLRB office and wait. San Miguel, Jr. does recall Mata telling him she was having difficulty contacting the EEOC however.<sup>233</sup> Mata had initially approached San Miguel, Jr. concerning the EEOC in July 2016.<sup>234</sup> San Miguel, Jr. recollects that in response to an inquiry from Mata about what to do when she could not get a response, he suggested “if I were you. I would just go and sit and wait until they see you.”<sup>235</sup>

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<sup>224</sup> TR p. 274, l. 11-20; Pay rate is a contractual matter which is not controlled by Local 28. TR p. 189, l. 6-p. 190, l. 2; TR p. 190, l. 11-14; RESP Ex. 22.

<sup>225</sup> TR p. 274, l. 21-23.

<sup>226</sup> TR p. 274, l. 24-p. 275, l. 7,

<sup>227</sup> TR p. 275, l. 1-5; RESP Ex. 2.

<sup>228</sup> TR p. 276, l. 9.

<sup>229</sup> TR p. 221, l. 5-19.

<sup>230</sup> TR p. 221, l. 20-p. 222, l. 8.

<sup>231</sup> TR p. 276, l. 9-20.

<sup>232</sup> TR p. 276, l. 20-22.

<sup>233</sup> TR p. 261, l. 15-21.

<sup>234</sup> TR p. 269, l. 2-9.

<sup>235</sup> TR p. 261, l. 22-25.

***While San Miguel, Jr. has no Recollection of Taking a Job From Mata, Mata was Subject to Non-Referrals for Work with Ceres/Gulf Winds***

While San Miguel, Jr. does not recall ever taking a work ticket from Mata, he did testify that at times an individual might accept a position they should not.<sup>236</sup> An example is when an individual has a non-referral in place which they may not be aware of.<sup>237</sup> If an individual is discovered to have worked while suspended under a non-referral, the individual is subject to a three day suspension for each day worked plus a mandatory thirty day suspension from the industry.<sup>238</sup> San Miguel, Jr. testified that if a work ticket was taken, it was likely the result of a non-referral.<sup>239</sup>

Mata did, in fact, have non-referrals during the first part of 2017. On January 10, 2017, Mata had an incident at Ceres/Gulf Winds requiring her to take a Yard Tractor refresher course.<sup>240</sup> On January 25, 2017, the Joint Productivity Review Committee (“JPRC”) upheld the non-referral until Mata completed the refresher course.<sup>241</sup> Mata completed the refresher course on February 1, 2017.<sup>242</sup> On February 14, 2017, Mata was involved in another incident resulting in a second non-referral to Ceres/Gulf Winds as a mule driver.<sup>243</sup> Again on February 15, 2017, Mata received a non-referral to Ceres/Gulf Winds due to another incident.<sup>244</sup> Mata had yet another incident on February 21, 2017 at Ceres/Gulf Winds.<sup>245</sup> On March 1, 2017, the JPRC upheld the penalty requested by

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<sup>236</sup> TR p. 260, l. 11-14; p. 261, l. 1-18.

<sup>237</sup> TR p. 261, l. 6-18.

<sup>238</sup> TR p. 208, l. 17-p. 209, l. 1.

<sup>239</sup> TR p. 263, l. 14-18.

<sup>240</sup> RESP Ex. 11 p. ILA28-000006.

<sup>241</sup> RESP Ex. 11 p. ILA28-000010.

<sup>242</sup> RESP Ex. 2.

<sup>243</sup> RESP Ex. 11 p. ILA28-000007.

<sup>244</sup> RESP. Ex. 11 p. ILA28-000008.

<sup>245</sup> RESP Ex. 11 p. ILA28-000009.

Ceres/Gulf Winds, a non-referral.<sup>246</sup> Mata has not worked at Ceres/Gulf Winds since February 21, 2017.<sup>247</sup> Mata asserts San Miguel, Jr. took a job away from her during their final meeting in February 2017.<sup>248</sup> However, Mata also testified she went to the NLRB office the same day and met with Duggan.<sup>249</sup> Mata's charge concerning coercion was signed by Mata on March 8, 2017.<sup>250</sup> The JPRC meeting upholding Mata's non-referral occurred at 10:00 a.m., March 1, 2017.<sup>251</sup> Therefore, if it occurred at all, the event likely occurred on March 8, 2017 when Mata was subject to a non-referral as upheld on March 1, 2017. It is entirely possible, if not probable, that if this event occurred, Mata misperceived it. Considering that San Miguel, Jr. reminded Mata of her January 25, 2017 JPRC meeting, yet she missed the March 1, 2017 meeting, it is apparent that Mata relied on San Miguel, Jr. when it came to work related matters.<sup>252</sup>

Mata admits that San Miguel, Jr. did not offer anything in exchange for dropping Mata's charge against Local 28.<sup>253</sup> There was no *quid pro quo*. No one with Local 28 asked San Miguel, Jr. to convince Mata to withdraw the charge.<sup>254</sup> San Miguel, Jr. was under no impression that anyone with Local 28 wanted him to convince Mata to withdraw her charge.<sup>255</sup> Local 28 was specifically told that any such decision was up to Mata and that Local 28 was not to be involved.<sup>256</sup> San Miguel, Jr. admits he was naturally torn between his personal family relationship with Mata and his role as an

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<sup>246</sup> RESP Ex. 11 p. ILA28-000011.

<sup>247</sup> RESP Ex. 7, p. ILA28-000147.

<sup>248</sup> TR p. 72, l. 15-19; TR p. 73, l. 8-23.

<sup>249</sup> TR p. 74, l. 5-6.

<sup>250</sup> GC Ex. 1(f).

<sup>251</sup> RESP Ex. 11, p. ILA28-000011.

<sup>252</sup> GC Ex. 5 (Tuesday, January 24, 2017 text); RESP. Ex. 11 p. 000011.

<sup>253</sup> TR p. 71, l. 25-p. 72, l. 3.

<sup>254</sup> TR p. 276, l. 23-p. 277, l. 1; TR p. 219, l. 10-25.

<sup>255</sup> TR p. 277, l. 2-5.

<sup>256</sup> TR p. 2221, l. 20-p. 222, l. 8.

officer of Local 28.<sup>257</sup> San Miguel, Jr. is clear that he wanted to make sure every member was treated correctly but that Mata, in particular, was taken care of. This is “why [he] was sort of the guy to go to, the guy to talk to, you know, between her and the staff.”<sup>258</sup> It is apparent that Mata and San Miguel, Jr.’s discussions concerning withdrawing her charge was not undertaken on behalf of, and certainly not at the direction of, Local 28. Rather, the discussions were due to the family relationship between Mata and San Miguel, Jr. and an outgrowth of her involvement of San Miguel, Jr. beginning in July 2016. There is simply no credible evidence suggesting or supporting the allegation that “since about December 1, 2016, [Local 28], by J.P. San Miguel, Jr., solicited [Mata] to withdraw her unfair labor practice charge in Case 16-CB-181716.”<sup>259</sup>

## **VI.**

### **Conclusion**

It is not disputed that Local 28 has a duty to operate its hiring hall in a manner that is not arbitrary, discriminatory, or in bad faith. Mata alleges Local 28 violated this duty. The evidence shows that Local 28 did no such thing.

The evidence shows that Mata was afforded the same opportunity for training as any other individual. There is a complete lack of evidence that Local 28 denied Mata training. There is a complete lack of evidence that Local 28 denied Mata inclusion on certification lists (which are not even maintained by Local 28). There is a complete lack of evidence that Local 28 took any other action concerning Mata due to her gender or for any other improper reason. The evidence shows Mata received timely training on her

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<sup>257</sup> TR p. 277, l. 19-p. 278, l. 7.

<sup>258</sup> TR p. 278, l. 1-7.

<sup>259</sup> GC Ex. 1(h) ¶¶ 9-11.

return to Local 28 in 2015, just as the unnamed man referred to by Atwood was. The evidence also shows that Mata routinely inquired about training belatedly. The evidence shows that Local 28 made information about training available routinely and timely and that the method of doing so was reasonable, objective, and for legitimate reasons. The evidence demonstrates that when Mata brought her allegations concerning Harris and lack of training to Local 28's attention in July 2016, the desired training was immediately made available. The evidence also shows that despite this, Mata declined to attend sessions. Put simply, the General Counsel fails to make out even a *prima facie* case against Local 28.<sup>260</sup> Even if a *prima facie* case were established, the evidence conclusively rebuts it.<sup>261</sup>

The coercion claim fares no better. Mata involved her relative, San Miguel, Jr., in this matter when she reported her allegations concerning Harris to him on June 30, 2016, over a year after she alleges she was last "assaulted" by Harris. The evidence shows that Mata and San Miguel, Jr. routinely discussed the matter and her intentions throughout. San Miguel, Jr. assisted Mata as she considered involving the EEOC and the NLRB in the matter. The evidence shows San Miguel, Jr. became concerned when his father was identified in the matter and that Mata did, in fact, express an interest in withdrawing her charge against Local 28 to San Miguel, Jr. In short, there is no evidence substantiating a claim that San Miguel, Jr. sought to coerce Mata into withdrawing her charge. Just as importantly, there is no evidence that Mata was offered anything in exchange for her withdrawal or that Local 28 directed or requested that San

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<sup>260</sup> See *Aerospace Industrial Dist.*, 270 N.R.B. 1059.

<sup>261</sup> See *Aerospace Industrial Dist.*, 270 N.R.B. 1059.

Miguel, Jr. convince Mata to withdraw her charge. There exists, quite simply, no basis for a finding that Local 28 sought to coerce Mata into withdrawing her charge.

Nothing substantiates the claim that Local 28 acted in a discriminatory, invidious, arbitrary, or unconscionable manner. The only result which can come from this matter is the rejection of Mata's claims and a determination that the Complaint in Case Numbers 16-CB-181716 and 16-CB-194603 be dismissed in its entirety.

WHEREFORE, PREMISES CONSIDERED, International Longshoremen's Association Local 28 respectfully requests that the Complaint in in Case Numbers 16-CB-181716 and 16-CB-194603 be dismissed in its entirety and for such additional relief to which International Longshoremen's Association Local 28 may be entitled to in law or equity.

Dated this 5<sup>th</sup> day of May, 2017.

**CERTIFICATE OF SERVICE**

This is to certify that on the 5<sup>th</sup> day of May, 2017, the undersigned attorney affirms under penalty of perjury that he caused a true and correct copy of International Longshoremen's Association Local 28's Post-Hearing Brief to be electronically filed using the National Labor Relations Board Region 16's website and thereafter served the following by United States First-Class Mail in a postage pre-paid properly addressed envelope at the following addresses designated for such purpose or, as where indicated, via e-mail.

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